No. 10995

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

CONTRACTORS, PACIFIC NAVAL AIR BASES, an Association, and LIBERTY MUTUAL INSURANCE COMPANY, a Corporation,
Appellants,

vs.

WM. A. MARSHALL, Deputy Commissioner of the United States Employees' Compensation Commission for the Fourteenth District and JOHN B. PIATT,
Appellees.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

BRIEF OF APPELLANTS

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INTRODUCTORY

This is an appeal from the final decree of the District Court granting appellees' motion for dismissal of appellants' Bill of Complaint for Mandatory Injunction and affirming the findings and award of William A. Marshall, Deputy Commissioner of the United States Employees' Compensation Commission

for the 14th Compensation District, respecting the claim of John B. Piatt filed therewith (Tr. 129-131).

JURISDICTION

District Court

The jurisdiction of the District Court is believed to be sustained by subdivision (b) of Section 21 of the Longshoremen's and Harborworkers' Compensation Act (Public Law No. 803—69th Congress) as amended (33 U.S.C.A. Sec. 921(b)) which reads in part as follows:

> "If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order, etc."

and under subsection (b) of Section 3 of the Defense Base Act (Public Law No. 208—77th Congress) (42 U.S.C.A. Sec. 1653(b)), reading in part as follows:

> "Judicial proceedings provided under Sections 18 and 21 of the Longshoremen's and Harborworkers' Compensation Act in respect to a compensation order made pursuant to this act shall be instituted in the United States District Court of the judicial district wherein is located the office of the Deputy Commissioner whose compensation order is involved if his office is located in a judicial district," etc.

Circuit Court

The jurisdiction of this court is believed to be sus-

tained by Judicial Code Sec. 128(a) (28 U.S.C.A. Sec. 225(a)), reading in part as follows:

> "The Circuit Courts of Appeal shall have appellate jurisdiction to review by appeal final decisions—
>
> "First. In the District Courts in all cases save where a direct review of the decision may be had in the Supreme Court under Section 345 of this title."

The decree appealed from was entered on October 20, 1944 (Tr. 129, 131); within three months thereafter, pursuant to Section 240-8(c) of the Judicial Code (28 U.S.C.A. Sec. 230), to-wit, on January 16, 1945, Notice of Appeal was served and filed in accordance with Rule 73(a) and (b) of the Rules of Civil Procedure (Tr. 132). Cost Bond on appeal in the sum of $250.00 was filed with the Notice of Appeal on January 16, 1945, pursuant to Rule 73(c) of the Rules of Civil Procedure (Tr. 133-136). Designation of Record, Proceedings and Evidence to be contained in the Record of Appeal was served and filed January 20, 1945, pursuant to Rule 75(a) of the Rules of Civil Procedure (Tr. 138-140). Statement of Points on which Appellants Intend to Rely on Appeal was served and filed January 20, 1945, pursuant to Rule 75(d) of the Rules of Civil Procedure (Tr. 136-137). Order extending time for filing the record on appeal and docketing the action to March 10, 1945, was entered by the District Court on February 23, 1945, pursuant to Rule 73(g) of the Rules of Civil Procedure (Tr. 143-144).

STATEMENT OF THE CASE

The question involved is whether there is any substantial evidence in the record to support the award of compensation by the Deputy Commissioner based upon a finding that the cerebral thrombosis, suffered by claimant John B. Piatt on February 26, 1943, was caused by an injury sustained by him December 1, 1942, when a glass composition indirect lighting globe fell from the ceiling and struck claimant on the head while in the employment of Contractors, Pacific Naval Air Bases, in the Territory of Hawaii.

The following is a brief summary of the evidence:

Claimant had been employed by the Contractors, Pacific Naval Air Bases, as a Procurement Agent in the Hawaiian Islands since December of 1939 (Tr. 17 and 26).

On December 1, 1942, claimant, then fifty-four and one-half years of age, was hit on the head by a three and one-quarter pound glass composition indirect lighting globe (Tr. 58) which fell from the ceiling, while he was sitting at his desk (Tr. 18, 19). The blow made him dizzy, but not unconscious (Tr. 36). The blow caused a very small cut on the upper forehead above the hairline (Tr. 20, 35). With the aid of two co-workers, he walked over to the first aid station about three or four hundred feet from the place where he had been hit (Tr. 60). There, Dr. Stewart removed a piece of glass from the cut, painted it, and told claimant to go home and keep quiet for 24 hours (Tr. 20).

The next morning, claimant went to the office for

a short conference lasting about an hour and one-half, which split up prematurely due to his fatigue and distress. He expressed a desire to see and be checked up by Dr. Cloward (Tr. 21).

Dr. Cloward was not in, so his nurse told claimant to go home and she would have Dr. Cloward call him (Tr. 22). Claimant then went home, and about four o'clock that day, Dr. Cloward called claimant and told him to go to the hospital where he would see him. Claimant was admitted to the Queen's Hospital on December 3, where he remained a bed patient until December 24, 1942 (Tr. 23).

After spending about a week at home and during the first week in January, 1943, claimant went to Dr. Cloward's office for a check-up (Tr. 24). On January 11, 1943 (Tr. 32), claimant went back to the office, working three or four hours a day, gradually increasing his working time until he worked full time for three days before his collapse on February 26, 1943 (Tr. 24, 25, 33).

During this entire period he was under medical observation and received checkups by Dr. Cloward at least once a week, and sometimes twice a week (Tr. 25).

Just before going back to work on January 11, 1943, Dr. Cloward had an electro-cardiograph made of claimant's heart to see if there was any possible heart lesion that was helping to keep up his blood pressure. Dr. Cloward told him he was "O. K." and that he would even pass him for life insurance (Tr. 34).

After his discharge from the hospital on December 24, claimant stated that he did not feel fully recovered, and that he had headaches "like a tight band across the top of his head," extending to the rear portion thereof (Tr. 34, 35). That sensation was continuous for approximately the first week after leaving the hospital, and it was recurrent thereafter but did not last (Tr. 36).

On February 26, 1943, claimant, while preparing to go to work, collapsed in his bathroom (Tr. 38), which Dr. Cloward testified was due to a "cerebral vascular accident" and having no relation whatsoever to his previous accident or injury (Tr. 113).

Prior to the date of the occurrence of the first accident, claimant was a man of seemingly unlimited energy, in charge of purchasing material to keep eleven battallions of Navy Engineers busy (Tr. 50, 51, 62). After returning to the office after his first accident, his colleagues noticed that he had failed in memory, particularly as to details, that he was annoyed with details, and was nervous and excitable to such an extent that the officials reconsidered a decision to make him head of a new supply division (Tr. 53, 54, 63, 64).

As a result of the stroke suffered on February 26, 1943, claimant was again hospitalized at Queen's Hospital, and remained there until May 5, 1943. He was continuously under the care of Dr. Cloward during both periods of hospitalization and for the intervening period (Tr. 33).

On or about May 25, 1943, claimant filed claim for

compensation for disability with the United States Employees' Compensation Commission, under Public Law 208, 77th Congress, Act of August 16, 1941, commonly known as the "Defense Base Act," alleging that the cerebral thrombosis which occurred on February 26, 1943, was the result of the injury which occurred December 1, 1942 (Tr. 14, 15).

The employer and insurance carrier gave due notice that the claim was controverted, and denied that the disability commencing on February 26, 1943, was caused by or resulted from injuries sustained on December 1, 1942 (Tr. 16). The matter then came on for hearing before Deputy Commissioner John C. Gray at Honolulu, T. H., on June 2, 1943, the hearing being held at the home of the claimant who was residing in Honolulu at that time (Tr. 13, 14).

At that hearing, testimony of claimant John B. Piatt (Tr. 17-40), his wife, Frieda F. Piatt (Tr. 40-45, 68-72), George L. Youmans, Piatt's Supervisor (Tr. 45-49), Cmdr. H. P. Potter, USNR, Officer in Charge of the Fifth Construction Battalion (Tr. 49-56), and A. W. Morgan, Piatt's principal assistant (Tr. 56-67) was introduced.

Dr. Cloward, the attending physician, was unable to attend the hearing on that date to give his testimony (Tr. 27). However, at the conclusion of that hearing, claimant waived personal appearance at a further hearing when Dr. Cloward's testimony could be taken (Tr. 72, 73). Claimant at that time was planning to return to the United States, and it was therefore agreed at that hearing that if a further

examination could not be taken at the Queen's Hospital before claimant left for the mainland, he would stop in San Francisco for further examination by doctors there (Tr. 76).

On June 30, 1943, the matter came on for an adjourned hearing before Deputy Commissioner Gray, at which time the testimony of Dr. Cloward was taken and transcribed, personal appearance having been waived by claimant (Tr. 95-122).

At that hearing Dr. Cloward testified that he examined the claimant about one hour after his admission to the hospital on December 3, 1942 (Tr. 97), and that "the most striking thing about his examination was that of extremely high blood pressure," which as he recalled was somewhere around 240 or 230/140. Continuing, the doctor said:

> "That initial blood pressure, we felt, *was probably* due to primary hypertension that the patient had *prior to his injury*, although we attributed some of it to the extreme nervous state that he was in on his admission to the hospital." (Tr. 98-99)

The doctor further testified that examination of claimant's head revealed "no very extensive wound," "that would look as though he had been struck by any heavy object," and that "there was no large bump, swelling or bruise of contusion" that he could find. The following day, however, there was a small crust found in his scalp from a "scratch" which he may have received from a cut from glass (Tr.99).

The remainder of his examination was entirely negative, and purely from the "*story*" and *not* the

examination of the patient's nervous system, he made a "*tentative*" diagnosis of concussion of the brain. He explained that a diognosis of concussion very frequently had to be made purely on history rather than on findings, because if a concussion is not severe enough to render a patient unconscious it is usually not severe enough to bring about any other change in the brain that can be demonstrated by a neuro-logical examination (Tr. 99).

The doctor explained that the blood pressure in any individual is measured by the systolic and diastolic measurements, and that the normal systolic measurement is 120 and the normal diastolic measurement is from 80 to 100, although as a "rule of thumb," a normal systolic measurement could be 100 plus the individual's age. Thus, if a man is fifty-four years old and he has a systolic measurement of 154, it would be considered normal (Tr. 100, 101).

Dr. Cloward further testified that any paralysis which is brought on by an accident to the head will come in two ways. Either it will come immediately at the time of the injury, due to a fracture of the skull, with destruction of that part of the brain controlling the movement of the extremities, or due to a very rapid loss of blood inside the head that presses on the brain. Paralysis of that type will come on immediately or within a period of a few minutes or hours after the injury. *Claimant did not have that type of paralysis* (Tr. 111).

The second type of paralysis that can occur following a head injury, according to Dr. Cloward, is due to a slow, gradual accumulation of blood on the out-

side of the brain. With such paralysis, the individual gradually over this period loses the function of his extremities. *It does not come on suddenly; it comes on slowly.* He will get awkwardness of his hands, his hands will get heavy; every day it gets a little weaker, and over a period of weeks (he thought the longest case he ever had was two months), he becomes paralyzed on that side Tr. 111).

It was his opinion, therefore, that if an individual goes from the time of his injury, two, three, or four or five months, and then suddenly, out of a clear sky develops a paralysis of his extremities, in the intervening period being perfectly well and *showing no signs of paralysis*, then the conclusion of all neurologists would be that he had had a second "lesion." By that, he meant a condition has arisen separate and apart from his original injury. That was his impression of Mr. Piatt (Tr. 112). He further testified that between Mr. Piatt's first discharge from the hospital and his second admission, from the *neurological standpoint he was perfectly normal.* In his examination of Piatt two or three times in his office, in the intervening period, the only thing he found was his extreme nervousness and the elevation in his blood pressure which was always around 190 to 180 systolic (Tr. 112).

The doctor further testified that the condition that brought about the paralysis on February 26 was something that hit him suddenly and knocked out the functioning of that part of his brain. It is called a "vascular accident," usually due to one of two

things: either a blood vessel in the brain ruptures, or it becomes plugged up (Tr. 113).

The cerebral vascular accident has nothing to do with trauma. With this history and the findings of the weakness of his extremity that became completely paralyzed in the next few hours, it was the doctor's opinion that Piatt had had a cerebral accident "probably secondary to his high blood pressure and *having no relation whatsoever to his previous accident or previous injury*" (Tr. 113).

In answer to the question whether it would be reasonable to attribute any disability prior to February 26 to the concussion as a matter of a temporary total disability due to his original injury, the doctor said:

> "Any disability from his first injury until he had the second accident, I would say would probably be on an *emotional* basis rather than organic basis." (Tr. 114)

Again, when asked to give his opinion as an expert in neurological cases whether the disability beyond February 26 was causally related to the minor blow that he received to his head, the doctor replied:

> "I don't know whether a person could say that plugging up was due to the blow he got on the head three months ago or not. *My personal opinion would be that it had no relation to it whatsoever.* I don't know what else I could say." (Tr. 115).

Later on in the testimony, Dr. Cloward said:

> "I said that in my opinion there would be no relation between the two, even though it seems like to be the layman. But from the pathological

standpoint, that is, conditions in the brain that produce the different pictures, the one is not a part or parcel of the other.

"Q (COMM. GRAY): In other words, had there been no accident it may have followed in normal course?

A That is right.

Q Is there a strong possibility that the accident did have something to do with it?

A I wouldn't say there was a strong possibility.

Q Reasonable possibility?

A I think it is very slight." (Tr. 117)

Mrs. Piatt, at the first hearing, had testified that Dr. Cloward had used the word "blood clot" in describing Mr. Piatt's condition during his first stay in the hospital (Tr. 71). Accordingly, Dr. Cloward was asked at the adjourned hearing whether there was anything in his observation of the case which suggested a blood clot on the first admission to the hospital. He answered:

"No, there was none whatsoever. If I made some statement to the wife or the nurse that I thought this man had a blood clot in his brain, it was certainly done unintentionally." (Tr. 119)

He repeated the same answer later on by saying:

"There was no evidence of any blood clot of any kind inside this man's head during his first admission to the hospital." (Tr. 119)

Commissioner Gray then asked him whether he found any evidence of a blood clot during the second admission to the hospital, to which the doctor answered:

"No, no. Our impression was that this was

purely a thrombosis or plugging up of blood vessels, rather than a rupture of a blood vessel." (Tr. 119)

Dr. Cloward concluded his testimony by explaining what is meant by cerebral thrombosis in the following language:

"I think I explained a little earlier the difference between thrombosis and hemorrhage. Had this paralysis been due to hemorrhage or rupture of a blood vessel, his paralysis would have been complete and profound on his admission to the hospital or immediately after it happened. The fact that on his admission to the hospital he had merely weakness without paralysis, a gradually progressive weakness to a paralyzed condition, within twelve hours, indicated that the process in his brain producing the paralysis was one of slow formation, and that we recognize as thrombosis or plugging of one of the arteries of the brain." (Tr. 121)

It will be remembered that at the conclusion of the first hearing, Mr. Piatt had made plans to return to the mainland, and had agreed that upon arriving in San Francisco, he would submit to further examination by doctors there. Accordingly, he was hospitalized at the Franklin Hospital in San Francisco for observation and study by Drs. Howard A. Brown and Ernest H. Falconer.

In Dr. Brown's report, he observed that X-rays of the skull showed no sign of any fracture or other pathological change (Tr. 83). After reviewing the file submitted, including the reports from Honolulu and the hospital records in the case, and after dis-

cussion with Dr. Falconer, who examined Piatt from a medical standpoint, Dr. Brown stated his opinion as follows:

> "Discussion: This patient originally sustained a blow to the head without loss of consciousness, but with slight laceration of the scalp. He showed no evidence of any brain injury, according to Dr. Cloward's report. There was no evidence of a fracture of the skull.
>
> "Following that, the patient had some head discomfort, which would not be unusual, considering his hypertension. However, he reached a point where he was able to return to work, and it was almost three months after the original blow to the head that the patient developed evidence of a definite cerebral vascular accident. I would agree with the previous examining physician that this represented a cerebral thrombosis secondary to his vascular disease and hypertension.
>
> "Considering the length of time that elapsed, following the blow to the head, plus the fact that this was a slight injury without evidence of any brain damage, I do not feel that there is any connection between the cerebral vascular accident occurring February, 1943, and the head blow of December, 1942.
>
> "The patient very definitely shows the hypertension and vascular changes which are a causative factor in the cerebral thrombosis, and, in my opinion, *this condition would have occurred regardless of whether the patient had a blow to the head in December or not.*" (Tr. 83, 84)

Dr. Falconer, after a complete examination, concluded his report with the following discussion and opinion:

> "This patient sustained a moderately severe

head injury on December 1, 1942. There was no loss of consciousness, no skull fracture, no evidence of any brain injury. He had rather protracted symptoms after the head injury due to his age and the fact that he has cerebral arteriosclerosis and hypertension.

"Patient returned to his work, and almost three months after his head injury, he suffered a thrombosis of a cerebral vessel, diminishing the blood supply to certain centers in the brain that control the muscular movements of face, arm and leg on the left side of the body. Cerebral thrombosis means that a clot forms inside a cerebral vessel. *I do not see any possible connection between the formation of this clot inside a cerebral vessel and his head injury nearly three months before.*

"He has evidence of arteriosclerosis in the fundi of the eyes, also in the kidneys as his urine shows constantly a small trace of albumin.

"On account of his hypertension his future is uncertain and he will be a candidate for future trouble of the type he is now suffering." (Tr. 89, 90)

After leaving San Francisco, Mr. Piatt returned to his home in Oregon, and the file was accordingly transferred to Deputy Commissioner William A. Marshall of the Fourteenth Compensation District, whose office is located at Seattle. No additional hearing was had before Mr. Marshall, and the only other evidence submitted to him were the medical reports of Drs. Brown and Falconer. After reading the record as thus made up, and without ever seeing the claimant or any of the witnesses in the case, Mr. Marshall

made and entered his compensation award on November 29, 1943, in favor of claimant based upon a finding holding in effect that the injury sustained by claimant on December 1, 1942, was the cause of the disability not only from December 1, 1942, to and including January 10, 1943, but also from February 26, 1943, continuously thereafter (Tr. 91-93).

The employer and insurance carrier, feeling aggrieved by said order, filed complaint for mandatory injunction on December 29, 1943, pursuant to Section 21 of the Longshoremen's & Harborworkers' Compensation Act (Tr. 2-12).

In due course, appellees filed a motion to dismiss (Tr. 123), and the matter came on for hearing before the District Court. On October 18, 1944, the District Court rendered its oral decision granting appellees' motion to dismiss upon the theory that the evidence in the record supported the Deputy Commissioner's findings and award, since the Deputy Commissioner under the authorities was not required to follow the testimony of the medical experts (Tr. 125-129).

The court's order granting the motion to dismiss and affirming the findings and award of the Commissioner was thereafter duly entered on October 20, 1944 (Tr. 129-131). This appeal followed.

SPECIFICATION OF ERRORS

1. There is no substantial evidence in the record to support the finding of the Deputy Commissioner that the accident that occurred on December 1, 1942, was the direct proximate cause of the cerebral thrombosis that occurred on February 26, 1943.

2. The claimant failed to sustain the burden of proof upon the issue of whether the accident that occurred on December 1, 1942, was the direct and proximate cause of the cerebral thrombosis that occurred on February 26, 1943.

3. The finding of the Deputy Commissioner as above, is a mere assumption based upon possibility and conjecture, instead of substantial proof, and is therefore not in accordance with law.

4. The Deputy Commissioner in making the finding as above, ignored all of the medical evidence presented herein.

5. The United States District Court for the Western District of Washington, Northern Division, erred in entering its order granting appellees' motion to dismiss and affirming the findings and award of the Deputy Commissioner.

ARGUMENT

Inasmuch as the various specifications of error are so inter-related that the argument upon one necessarily involves a discussion on each of the others, and in order, therefore, that this brief will not be unduly encumbered with repetitious arguments, ap-

pellants will treat all the assigned errors in one argument, a brief summary of which is as follows:

1. The findings must be supported by "substantial evidence."
2. Substantial Evidence: Necessity of medical testimony.

I.

The Findings Must Be Supported by "Substantial Evidence"

The statute with which we are concerned provides:

> "If not in accordance with law, the compensation order may be suspended or set aside in whole or in part * * *." (33 U.S.C.A. 921(b))

This language was construed by Mr. Chief Justice Hughes in *Crowell v. Benson*, 285 U.S. 22, 46, 52 S. Ct. 285, 291, 76 L. ed. 598, 610, to mean that, "* * * the findings of the Deputy Commissioner, *supported by evidence* and within the scope of his authority, shall be final" (Our italics). This construction was arrived at to support the validity of the act in the year 1932.

Thereafter, and in January of 1944, the Circuit Court of Appeals for the Second Circuit decided the case of *Steamship Terminal Operating Corporation, et al. v. Schwartz*, 140 F.(2d) 7, 8, and in a *per curiam* opinion said:

> "* * * The Supreme Court has several times declared that if there is evidence to support the findings of a Deputy Commissioner, they must be affirmed; and by this we understand 'substantial' evidence."

Further clarification of the construction and meaning of the phrase "supported by evidence," as used

by the Supreme Court in the *Crowell* case, is contained in *Consolidated Edison Co. v. National Labor Relations Board*, 305 U.S. 197, 229, 83 L. ed. 126, 140, where the Supreme Court, in construing a similar provision in the National Labor Relations Act said:

> "We agree that the statute, in providing that 'the findings of the Board as to the facts, if supported by evidence, shall be conclusive,' means supported by *substantial evidence.* * * * Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." (Our italics)

Again, in *National Labor Relations Board v. Columbian E. & S. Co.*, 306 U.S. 292, 299, 83 L. ed. 660, 665, the Supreme Court, speaking of the National Labor Relations Act, said:

> "Section 10(e) of the Act provides: '* * * the findings of the Board as to the facts, *if supported by evidence*, shall be conclusive.' But as has often been pointed out, this, as in the case of other findings by administrative bodies, means evidence which is substantial, that is, affording a substantial basis of fact from which the fact in issue can be reasonably inferred. * * * Substantial evidence is more than a scintilla, and must do more than create a suspicion of the existence of the facts to be established." (Our italics)

In the light of the foregoing cases, there can be no question but that a compensation order is not "in accordance with law" and may therefore be set aside by the reviewing court, if the findings upon which the order is based are not supported by "substantial evidence."

As said by the court in *National Labor Relations Board v. Compson Products, Inc.*, 97 F.(2d) 13 (C. C.A. 6th Cir.) at page 15:

> "The rule of substantial evidence is one of fundamental importance and is the dividing line between law and arbitrary power. Testimony is the raw material out of which we construct truth and, unless all of it is weighed in its totality, errors will result and great injustices be wrought."

This case, therefore, presents the narrow issue: Are the findings of the Deputy Commissioner as to causal relationship supported by "substantial evidence" as these words are above defined?

II.

Substantial Evidence: Necessity of Medical Testimony

It is obvious that we are dealing here with a highly complicated medical subject requiring, of necessity, the opinion of expert medical testimony to establish the pathological cause of the cerebral thrombosis suffered by claimant on February 26, 1943.

That Deputy Commission Gray, who conducted the original hearing on the matter, clearly recognized that fact, will be seen from his careful and painstaking examination of Dr. Cloward, during which he said:

> COMM. GRAY: "All I am trying to do is get the facts. Here we have a man, as I understand it from the record, had been performing his work in more or less a normal state; an accident intervened and he has two occurrences, as we see them. The one was of a temporary nature;

he returned to work and attended certain conferences, as the record will show, under difficulty. In fact, they cut the conferences short because of his apparent distress. Then his wife goes in and finds him in the bath room apparently in the throes of a paralytic state, and he is returned to the care of a doctor. *Purely a medical question.*"

COMM. GRAY: "I have to depend upon the doctor's professional knowledge, and what I am trying to do, on the basis of his professional knowledge, is to determine the possibility or the probability of the second occurrence being related to the first occurrence."

COMM. GRAY: "I have to determine it in the final analysis and *I can only determine it on the basis of the advice that the doctors give to me.* I am not trying to sway the doctor's opinion; I am trying to find out what he thinks about it." (Tr. 116)

The rule as to the necessity of medical testimony in such cases is well stated in 32 C.J.S. Sec. 569d, page 399, as follows:

"As a general rule the weight to be given the opinion of a medical or other expert witness as to the cause or effect of a happening, condition, situation, or circumstance is for the jury or other trier of the facts, and the opinion is not conclusive, *but when the subject under consideration is one within the knowledge of experts only, and there is no reason for the exercise of common knowledge, undisputed expert testimony which is based on scientific processes, methods, or knowledge is to be accepted as conclusive by the trier of the facts,* provided the credibility of the witness or witnesses is accepted. An expert opinion as to cause or effect may constitute substantial

> evidence, sufficient to support a finding in accordance with the opinion. Expert evidence as to causal connection is not necessary where facts are testified to by lay witnesses with sufficient clearness that laymen in ordinary affairs of life can infer cause from effect, *but, where an injury is of such a character as to require skilled and professional men to determine the cause thereof, the question is one of science, which must be proved by the testimony of skilled and professional men.*"

Certainly the cause of the cerebral thrombosis in question here, involves a determination of abstruse physical processes, concerning which a layman can have no well-founded knowledge, and can do no more than indulge in mere speculation and conjecture.

Clearly, the cause thereof is purely a question of science which must be proved by the testimony of skilled and professional men.

A well-reasoned case bearing out this principle is *Pacific Employers Ins. Co. v. Ind. Acc. Comm.*, 118 P.(2d) 334 (Cal. 1941). There the question was whether there was any evidence in the record to support the award of compensation based upon a finding that a varicose ulcer from which applicant was suffering constituted a new and further disability proximately caused by an injury for which the claimant had already received medical treatment.

There, as in this case, the medical experts testified or reported that there was no causal relation between the original injury and claimant's subsequent condition. There was evidence, however, that the subsequent ulcer was in the exact site or in the region of

the original ulcer. Also, the claimant testified that her personal ~~physical~~ physician told her that the original injury was responsible for her subsequent condition.

The court, in setting aside the award as not based on "evidence," announced the following principles:

1. The findings of the Commission are subject to review only insofar as they have been made without any evidence whatever in support thereof.
2. An award of compensation may not be based upon surmise, conjecture or speculation.
3. Evidence that the subsequent ulcer was in exact site or in the region of the original ulcer, standing alone, was not sufficient upon which to base an award upon the ground that the original injury proximately caused a new and further disability.
4. The *location* of the subsequent ulcer in the region of the former could be proved by testimony of a layman, who observed its external appearance, but the *cause* of such ulcer could best be proved by one having expert scientific knowledge.
5. Witnesses of common experience from ordinary observation and obvious facts may testify as to the existence of the physical or mental condition, but the pathological cause of an ailment is a scientific question upon which it is necessary to obtain scientific knowledge.

Concluding its opinion, the court said:

> "The Commission evidently disregarded the testimony of experts introduced by the petitioner herein to the effect that the present ulcer was in no way related to the original injury. This was within the province of the Commission, but

it leaves the record devoid of evidence upon an ultimate fact on a scientific question."

Likewise, the record here is barren of any expert medical testimony establishing a causal connection between the accident that occurred on December 1, 1942, and the cerebral thrombosis which developed approximately three months thereafter, on February 26, 1943. Thus, Dr. Cloward, who was the attending physician, testified that claimant's collapse on February 26, 1943, was due to cerebral thrombosis, which had no connection whatever with the blow received on December 1, 1942. He admitted that, to a layman, there might appear to be some connection, but not to him. He concluded, after watching the claimant for a few days, that he was a "maniac depressive type," and said that the high blood pressure from which the claimant was suffering at the time he first examined him, was not due to the accident, and that this high blood pressure caused the vascular accident that resulted in his paralysis.

Dr. Howard A. Brown, who examined claimant at the Franklin Hospital in San Francisco in June, 1943, after observation and study, concluded his report by saying that the hypertension and vascular changes which are a causative factor in the cerebral thrombosis, would have occurred regardless of whether the patient had a blow to the head in December or not.

Dr. Falconer, who likewise examined the claimant in consultation with Dr. Brown, gave as his unqualified opinion that there was no possible connection between the formation of the clot that formed inside

claimant's cerebral vessel and his head injury nearly three months before.

In *City of Owensboro v. Day*, 145 S.W.(2d) 856 (Ky. 1940), the court said:

> "When the disputed fact is one relating to a particular science, concerning which only an expert may possess knowledge, then the witness necessarily becomes an expert in that science, since laymen are not supposed to — and in a great majority of cases do not—possess knowledge concerning the involved, obscure and scientific facts. Therefore, in a case like this one, the only competent witnesses to prove the concrete and decisive fact involved must necessarily be members of the medical profession. Laymen can, and they did in this case, testify concerning many relevant facts — concerning the conduct, effect, external symptoms, reduction in weight, and other occurrences and conditions having a more or less bearing upon the case, but, after all, the expert witness must be consulted in order to arrive at a correct conclusion."

The court below, in its oral decision, did not concede, of course, that there was no medical testimony tending to support the findings. It gave two examples of what it considered "medical testimony" in support of such findings:

(1) Dr. Cloward's purported statement to Mrs. Piatt concerning the blood clot not dissolving as a reason for the doctor keeping Mr. Piatt in bed in a reclining position longer than the doctor had expected to do; and

(2) Dr. Cloward's testimony that it could not be said positively whether the accident caused the paralysis or not, and that cerebral par-

> alysis could develop quickly or gradually and progressively.

It is submitted that neither one of these examples constitutes medical testimony of such quality or degree as can be said to be "substantial evidence" as heretofore defined. At most, they constitute nothing more than "scintilla" and do nothing more than "create a suspicion of the existence of the fact to be established."

Considering the first example given by the court, there are three answers to the same:

> (1) The statement was "mere uncorroborated hearsay" and as such does not constitute "substantial evidence." *Consolidated Edison Co. v. National Labor Relations Board,* 305 U.S. 197, 230, 83 L. ed. 126, 140.
>
> (2) Dr. Cloward testified positively that there was no evidence of any blood cot during the claimant's first admission to the hospital, and that if he ever made such a statement to claimant's wife, it was "certainly done unintentionally." (Tr. 119)
>
> (3) The statement of itself does not establish causal relationship.

As to the second example of medical testimony given by the court below, the following may be said:

> (1) The mere fact that Dr. Cloward stated that he didn't think it could be said positively one way or the other that the injury to claimant's head caused his paralysis, certainly, of itself, would not constitute "substantial evidence" upon which the finding of causal relationship could be based, since it amounts to nothing more than a statement of doubt on the subject;

(2) His testimony must be read in its entirety, and the meaning thereof not distorted by selecting a word or phrase here and there. His explanation as to the two methods whereby paralysis is brought about through an accident to the head, when read in its entirety, establishes that claimant's paralysis did not come from either method. It certainly did not come on immediately following the blow, and *it did not come on gradually*, since it was not evidenced by any awkwardness of the function of claimant's extremities during the intervening period. There was no evidence that claimant showed any signs of paralysis from December 1, 1942, to February 26, 1943. On the contrary, the evidence was undisputed that the paralysis came on suddenly on the latter date, *with no intervening signs of paralysis in the interim.* How, then, can it be said that Dr. Cloward's explanation that cerebral paralysis could develop quickly or gradually and progressively, supports the finding of causal relationship herein, from a medical standpoint?

The lower court, however, did not rely upon these examples of so-called "medical testimony" upon which to base its decision. Rather, it felt that support for the finding of causal relationship could be found in the *non-medical testimony*, and that the medical testimony to the contrary could be disregarded.

In other words, medical testimony was not necessary to establish the pathological cause of the cerebral thrombosis suffered by claimant, but that proof thereof may be established from the testimony of laymen concerning the conduct, effect and external symptoms of the claimant.

The lower court as authority for such a conclusion relied upon the following four cases, the facts and holdings of which are as follows:

1. *Southern S.S. Co. v. Norton*, 41 F. Supp. 108 (D.C. Penn. 1941). There, the employee was struck on the face over his eye by a cargo net. He testified that his vision was impaired after the accident, although it had not been impaired prior thereto. One of the doctors who examined the employee at the instance of the Deputy Commissioner, reported that there was a partially dislocated lens in his eye which with other conditions present, was sufficient to account for the diminution in vision. He further stated that in his opinion "this condition could have been caused by the above injury. Likewise, it was perfectly possible that this could have existed before the injury."

Another impartial physician rendered his report, in which it was stated that there was a dislocated lens in the left eye, and that "this man's condition may be due to the accident or it may have existed prior to this injury."

Several doctors, testifying for the employer, stated that while there was some physical injury to the eye due to the accident, the latter caused no impairment of sight.

On the basis of this evidence, the court held that there was sufficient competent evidence to support a finding by the Commissioner to the effect that the injury did result from the accident.

In the first place it does not appear from the decision whether any interval of time elapsed between the occurrence of the accident and the subsequent

diminution in vision. In all probability however, both occurred simultaneously. Secondly, all doctors agreed that there was some physical injury to the eye due to the accident, the only dispute being whether such physical injury caused impairment of sight. Thirdly, one of the doctors gave as his opinion that the impairment in vision could have been caused by the injury. Lastly, this was a case where laymen in ordinary affairs of life could infer cause from effect, for obviously if the testimony of the employee was believed that his left eye and vision was normal prior to the accident, but that he could not see so well after the accident, and doctors corroborated the presence of actual physical injury to the eye, medical testimony positively establishing a causal relation was obviously unnecessary.

In the case at bar, however, the original accident and the paralysis that manifested itself did not follow each other in such immediate sequence as to permit laymen in ordinary affairs of life to infer cause from effect. Also in the case at bar, all the doctors were unanimous in their several opinions that there was no causal connection, and that the paralysis was due to hypertension and vascular changes, which were not in any way related to the original blow. In other words, the medical testimony definitely and positively established no causal relation. This was not even a "doubtful" case from a medical standpoint.

2. The next case relied upon by the lower court was *Ryan Stevedoring Co. v. Norton*, 50 F. Supp. 221 (D. C. Penn. 1943). There, the opinion does not disclose the nature of the injury or the disabiilty involved.

The decision merely states that the claimant was injured on April 25, 1939, and was disabled intermittently to August 4, 1940, and received compensation for this disability. In August of 1941, claimant filed a claim for compensation on the ground of recurrence of the disability, and after a hearing, an award was made for compensation for a period of about four weeks. Thereafter, there was a further recurrence of disability, and compensation was voluntarily paid until February 12, 1942. In April, 1942, the claimant filed an application for review, and an order was entered allowing compensation for a period terminating April 2, 1942. The award which plaintiffs sought to set aside was made August 28, 1942, and granted compensation to the claimant for a three-week period beginning August 6, 1942, on the ground that claimant had suffered another recurrence of total disability during that period.

At the hearing, the only doctor who testified stated that there was no causal connection between claimant's present disability and the accident of April 25, 1939. However, the award was sustained on the basis of claimant's own testimony as to his condition and ability to work prior to the accident and the pain which he suffered during the period in question when he attempted to perform any physical labor, a condition which had recurred intermittently for a period of several years since the injury.

In connection with that case, it may be said that since the nature of the injury or disability involved is not disclosed, it might therefore very well be that the cause of the disability was not of the type re-

quiring expert medical testimony. Furthermore, the disability involved was apparently a subjective condition, and one for which compensation was allowed as late as April 2, 1942. The facts in that case, therefore, are so obviously dissimilar to the facts in the case at bar, as to rob the decision of any convincing weight.

3. The third case relied upon by the lower court was *Frank Marra Co. v. Norton*, 56 F.(2d) 246 (D.C. Penn. 1931). There, the question was whether the employee died in consequence of the injuries sustained, or whether his death was due to what are usually termed natural causes. The opinion does not disclose the type of injury or the interval that elapsed between the two events.

The medical testimony was merely to the effect that the death might have been due to the injuries received. The Court conceded that if the expert testimony was all the evidence in support of the findings made, it would have been insufficient. But it said that there was other evidence, without specifying it, that would support the finding, and therefore the expert testimony need not have been relied upon.

That case is likewise weak as authority in view of the nondisclosure of the type of injury received and of the time intervening before the death resulted. It may very well have been therefore that laymen in ordinary affairs of life could infer cause from effect, from the facts themselves, without the aid of expert opinion. Certainly, the cause of a death is not within the peculiar province of expert opinion in every instance.

4. The last case cited by the court as authority is *McNeelly v. Sheppeard*, 89 F.(2d) 956 (5th Cir. 1937). There, the question was whether the pneumonia which the employee died of was caused through becoming overheated and suddenly chilled as a result of his employment. The Deputy Commissioner found that the working conditions were otherwise normal, and that neither the work in which he was engaged nor the conditions of his employment caused him to become overheated. He thereupon denied compensation. The employee's physician testified that he thought the cause of death was the natural result of the condition under which he worked, but he also testified that sleeping in a draught, or driving in an automobile, or other exposure could cause it, and that often a man in good health could take pneumonia without any exposure; it coming from different causes and being no respecter of persons.

The District Court affirmed the order denying compensation, saying that the physcian's opinion, while admissible, was not conclusive.

It will be noted that this case does not involve the occurrence of any accident. Furthermore, pneumonia was shown not to be an occupational disease. At any rate, this was a case where the subject under consideration was not one within the knowledge of experts only, but one within the common knowledge of laymen. It is difficult to see how this decision stands in the way of a reversal of the order complained of.

Additional cases were cited by Appellees in the lower court as authority for the statement that the Deputy Commissioner is not bound to accept the opinion or

theory of any particular medical examiner, and that he may rely upon his own observation and judgment in conjunction with the evidence. These cases will be discussed in chronological order:

1. *Joyce v. United States Deputy Commissioner*, 33 F.(2d) 218 (D.C. Me. 1929). This case was the first to announce that doctrine and cited no cases in support thereof. The case, however, does not involve a question of causality, but merely a determination of the percentage of disability sustained by an employee to his hand. The court recognizes that the question was not "wholly a medical question."

This was clearly a case where the Deputy Commissioner was in as good a position to pass on the question *from his own observation*, as any doctor could do, since the injury was visible.

2. *Jarka Corporation v. Norton*, 56 F.(2d) 287 (D. C. Penn. 1930). The injury involved herein was a fracture of a bone in the spinal column. The question involved was not strictly a matter of causation, but merely whether the pain which the claimant complained of wwas due to the fracture. A disinterested doctor testified as to "possibility." The opinion likewise does not cite any case on this point.

3. *Zurich General Accident & L. Ins. Co. v. Marshall*, 42 F.(2d) 1010 (D.C. Wash. 1930). The injury involved was a fractured back and a dislocated shoulder. Several doctors testified that the claimant was totally incapacitated from following the duties of a longeshoreman. The question was whether claimant was actually disabled, and the matter of causation was

in no way involved. The opinion merely states that the *Joyce* case *supra* "is in harmony herewith."

4. *Booth v. Monahan*, 56 F.(2d) 168 (D.C. Me. 1930). This opinion was written by the same judge who wrote the opinion in the *Joyce* case *supra*. Like the *Joyce* case, it involved merely the percentage of disability sustained to an injured limb, and does not involve the question of causation.

5. *Baltimore & Ohio R.R. Co. v. Clark*, 56 F.(2d) 212 (D.C. Md. 1932). In this case, the employee died two days following an attack of heat prostration. Actually there was medical testimony in support of the finding of causal relationship. It will be further noted that a comparatively short interval intervened between the two events.

6. *Liberty Stevedoring Co. v. Cardillo*, 18 F. Supp. 729 (D.C. N.Y. 1937). In this case, there was involved an injury to the foot. The claimant was under continuous medical treatment at a hospital for one and a half years. His leg was eventually amputated. Medical evidence supported the finding of causal relationship.

It will be seen from a review of each of the foregoing cases that the question of causation was not involved in many of them, and in those where that question was involved, there was medical testimony in support of the finding. These cases go no further than to state the rule that the Deputy Commissioner is not required to follow the testimony of medical experts where there is other *competent* evidence to support the finding. They do not pass upon the question of whether non-medical testimony *is* competent to prove

causation where the physical processes terminating in death or disability are obscure and abstruse, and concerning which a layman can have no well-founded knowledge. Appellants submit that the rule firmly established in the State courts to the effect that where disability for which compensation is sought under the Workmen's Compensation Act is of such a character as to require the determination of its nature, cause and extent to be made by professional persons, the only competent proof thereof must be made by the testimony of such witnesses, should be followed by this court.

A State decision on "all fours" with the situation involved in the case at bar, is *Burton v. Holden & M. Lbr. Co.*, 20 Atl.(2d) 99, 135 A.L.R. 512 (Vt. 1941). The case involved a determination of the cause of cerebral thrombosis and the sufficiency and necessity of expert medical testimony to support the finding and award of a Workmen's Compensation Commissioner. The facts were these:

On April 9, 1940, Burton, aged 61, was examined by a physician for hospital benefit insurance, and was found to be in normal condition for a man of his age, and no material hardening of the arteries was observed. On April 11, 1940, he got a sliver in his left thumb while working in the lumber yard of defendant employer. He was first treated by a doctor on April 18 following, who testified that Burton was then suffering from an infection of the injured thumb; that the infection was localized and did not go into his system at any time, and, although serious as far as the function of the thumb was concerned, was not

serious as far as his system was concerned; that the thumb healed perfectly well, but continued to be more tender than the other thumb, which was to be expected, inasmuch as there was new scar tissue there and the thumb had gone through a process of inflammation; that ten days to two weeks after the thumb had healed, he was again called upon to treat Burton, and found that he had difficulty in walking, had been a bit confused, was unable to get about his house without some help, and was in a weakened condition; and that he was taken to the hospital, where he remained three weeks, until he died of cerebral thrombosis on June 19, 1940. *The doctor further testified that in his opinion the infection could have been a possible contributing cause of the thrombosis.* The question certified for review was whether the evidence concerning the alleged causation of death by the injury to decedent's thumb was legally sufficient to support the finding that the injury to the decedent's thumb resulted in his death.

The Supreme Court of Vermont, in annulling the order of the Commissioner of Industrial Relations, said:

> "There are many cases where the facts proved are such that any layman of average intelligence would know, from his own knowledge and experience, that the injuries were the cause of death. In such a case the requirements of law are met without expert testimony. * * * But where, as here, the physical processes terminating in death are obscure and abstruse, and concerning which the layman can have no well-founded knowledge and can do no more than indulge in mere speculation, there is no proper foundation for a find-

ing by the trier without expert medical testimony. * * *

"The mere fact that the infection in decedent's thumb resulting from the sliver could have been a possible contributing cause of his death, does not alone warrant a finding that it was. * * * There must be created in the mind of the trier something more than a possibility, suspicion or surmise that such was the cause, and the inference from the facts proved must be at least the more probable hypothesis, with reference to the possibility of other hypotheses. * * *

"The Commissioner recognized that the cause of death was obscure, that expert medical testimony could alone lay a foundation for his award, and that the testimony of the doctor that the infection from the sliver could have been a possible contributing cause of death, without more, was not enough to support an award. But by taking into consideration all of the evidence, not only the expect testimony but also all the circumstances of the case as shown by the evidence, he concluded that he was justified in finding that the sliver was the cause of death.

"Since expert evidence that an accident can or cannot cause a certain result may affect the conclusion to be reached * * *, it follows that in the case of injuries so naturally and directly connected with the accident that proof of causation does not depend upon expert evidence, medical testimony of 'possibility' may corroborate the other testimony. But unless the facts, outside such medical testimony, fairly warrant the conclusion that the injury resulted from the accident, causation is not established. * * * A possible cause cannot be accepted as the operating cause unless the evidence excludes all other causes

> or shows something in direct connection with the occurrence. * * *"

In concluding its opinion, the court said:

> "In spite of the decedent's good health so soon before his death, a layman of average intelligence, from his own knowledge and experience, could have no well-grounded knowledge that the sliver was the cause of death. Although told that the sliver might have caused the fatal illness, the trier could only speculate as to whether it did or not."

To the same effect see *Cutler v. Bergen Etc. Co.*, 25 Atl.(2d) 75 (Penn.).

As in the *Burton* case, Deputy Commissioner Gray, who conducted the original hearing in this matter, and was the only one to face the various witnesses, recognized that the cause of the cerebral thrombosis was obscure, and that expert medical testimony could alone lay a foundation for an award, when he said that the situation involved "purely a medical question," and that "I can only determine it on the basis of the advice that the doctors give to me" (Tr. 116).

The *Burton* case is also similar to the case at bar not only because it involved the same subsequent ailment, *viz.*, cerebral thrombosis, but also because the Commissioner felt that while the medical testimony was insufficient of itself, he was justified, by taking into consideration all of the circumstances of the case, in finding that the original accident was the cause of death. In other words, the Commissioner there, as the Deputy Commissioner in the instant case, permitted sequence of events to supply the necessary proof of causation in a case where a layman of aver-

age intelligence could have no well-grounded knowledge on the particular ailment in question.

In 32 C.J.S., p. 1127, Sec. 1042, the author, speaking on the subject of causation, says:

> "The mere fact that one event follows another in time does not establish a causal relationship between them."

Cited in support thereof is *Bussmann Mfg. Co. v. National Labor Relations Board*, 111 F.(2d) 783 (8th Cir. 1940), where the court said, at page 787:

> "Proof of mere sequence is not sufficient to establish consequence or causal sequence. A post *hoc ergo proper* hoc is sound neither in logic nor in law."

As an illustration, the 32 C.J.S., p. 1127 cites *Traders & General Ins. v. Cole*, 108 S.W.(2d) 864 (Tex.), holding that proof that a person was sane prior to accident and that at some time after the accident he become insane, did not, in the absence of evidence that the accident was the cause of the insanity, constitute proof that insanity was the result of the accident.

The *Burton* case presented a stronger case from a medical standpoint than that presented in the case at bar, since the doctor there went so far as to say that the infection could have been a "possible contributing cause" of the thrombosis. In the instant case, there is not even that opinion expressed by any of the doctors. The strongest admission made by any of the doctors came from Dr. Cloward, who in answer to Deputy Commissioner Gray's question as to whether there was a "strong possibility" that the accident did have something to do with the subsequent disability, answered:

> "I wouldn't say there was a strong possibility. I think it is very slight." (Tr. 117)

CONCLUSION

The Deputy Commissioner who entered the order complained of herein had only the cold record upon which to predicate his findings. This is not a case where he could from his own observation of the claimant, arrive at his own conclusions. Instead the case presented a "purely medical question." After reading the record, he chose to disregard entirely the only true probative evidence in the case, given by men of science, who were the only persons qualified to pass on such a highly complicated medical question. As stated in *Pacific Employers Ins. Co. v. Ind. Acc. Comm.*, 118 P.(2d) 334 (Cal. 1941), this probably was within his province, but by disregarding the medical evidence the record was thereby devoid of the only competent evidence bearing on the question of cause and effect. In so doing, the Deputy Commissioner entered the field of speculation and conjecture. The award entered by him, being based on speculation and conjecture, rather than upon "substantial evidence" is therefore "not in accordance with law." The compensation order of the Deputy Commissioner should therefore be annulled, set aside and held for naught, and the Judgment of the District Court granting Appellees' Motion for Dismissal of Appellants' Complaint for Mandatory Injunction should be reversed.

Respectfully submitted,

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